BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of AIDEN N., Claimant, And REGIONAL CENTER OF ORANGE COUNTY, Service Agency.	OAH No. L 2006030097 (Early Intervention Services Act Gov. Code, §§ 95000 et seq.)

DECISION

On April 4, 2006 in Santa Ana, California, Stephen E. Hjelt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

The Regional Center of Orange County (hereinafter referred to as RCOC, or service agency) was represented by Mary Kavli, Consumer Services Representative.

Aiden N. (hereinafter claimant) was represented by Megan N., claimant's mother.

The record was opened and evidence and testimony was taken. All exhibits offered by both sides were marked for identification, received in evidence and accorded the weight the Administrative Law Judge determined.

ISSUES

1. Is the Regional Center of Orange County entitled to refer the claimant to California Children's Services (CCS)?

2. Did claimant establish medical fragility or some other justification to justify keeping RCOC as the provider of in-home PT and OT services?

For the reasons explained more fully below, the answer to question No. 1 is "yes." The answer to question No. 2 is "no."

FACTUAL FINDINGS

1. Claimant is currently a client of the RCOC and receiving services through the Early Intervention Program. He was born on December 16, 2004 with a multitude of extremely serious medical problems. At the time of the hearing he was receiving services from the regional center which consisted principally of PT and OT. Although there are many facts that are important for the determination of issues in this case, the core of the dispute revolves around the following. The family is adamant that claimant continue to receive the services he is getting at home in his "natural setting." The regional center takes the position that his medical condition requires a referral to CCS because CCS is a generic resource and the regional center is the payer of last resort. The practical result of such a referral is that CCS generally does not provide PT or OT in a client's home. Such therapy is provided at the facility. The only way for in home services to continue is through a finding that claimant Aiden N. is "medically fragile." If such a finding of medical fragility is made, then CCS refers the client back to regional center for the provision of services, which would no doubt continue in the home. As of the date the record closed, CCS had made a finding that Aiden was not medically fragile and the family has appealed the decision. That appeal of a denial of medical fragility is not the subject of this hearing nor does the Office of Administrative Hearings have jurisdiction over the propriety of the denial by CCS. To the extent that findings are made regarding medical fragility, they are made in the context of the family's claim that they have established medical fragility in this case and such medical fragility justifies RCOC making an exception to the requirements of generic resource/payer of last resort.

2. There is nothing in this record that suggests that the family is motivated by anything other than a desire to secure all necessary supports and services for their child. Like most families of special needs children, this family has fought tirelessly for the best interest of their child. This zeal, however, can be misperceived as stubbornness and defiance.

3. The evidence in this case is clear in certain respects. Aiden N. was an appropriate case for referral to CCS. There is no question that he has severe physical disability resulting from congenital defects or those acquired through disease, accident or abnormal development. Furthermore, the regional center is mandated by the Lanterman Act to seek such a referral since CCS is clearly a generic resource and RCOC cannot by law duplicate services available through a generic resource.

4. Aiden N, born December 16, 2004, was a preemie with a very complicated prenatal history that led to significant and substantial medical challenges after birth. Aiden was a twin. His twin died in utero at 24 weeks. He suffered grade IV intracranial hemorrhage and developed hydrocephaly secondary to twin to twin transfusion. He was born

at 34 weeks. Following birth, it was determined that he suffered from, among other things, microcephaly with developmental delay, hypertrophic cardiomyopathy and renal failure. He has been the object of extensive medical attention by multiple specialists since birth. It appears that his cardiomyopathy is resolving but the renal problems may necessitate a transplant.

5. Aiden N. has been a client of the regional center since shortly after his birth. As part of the Early Intervention assessment, it was determined that Aiden could benefit from PT and OT which were in place on the date of the hearing. Claimant's mother had a disagreement with the original provider of PT services and the provider was changed. The current provider is, in the mother's mind, an exceptional and appropriate person for Aiden. The provider is the perfect fit, according to the mother.

6. The regional center monitored the condition and progress of Aiden. The regional center determined that the neurological deficits exhibited by Aiden most likely would make him eligible for services from CCS. They communicated this to the family. The family was and remains completely resistant to this.

7. The family reluctantly agreed to have Aiden assessed by Glenn W. Fowler M.D., a Professor of Pediatrics and Neurology at the University of California, Irvine Medical Center. Dr. Fowler frequently assesses children at the request of the regional center. The evaluation took place on January 25, 2006.

8. The evaluation was for the purpose of determining possible eligibility for CCS services. Dr. Fowler noted the congenital anomalies of the brain including ventriculomegaly post intraventricular hemorrhage. His examination revealed a well nourished infant with "obvious microcephaly." He further found "Muscle tone was significantly increased in both upper and lower limbs with tight hip adductors. The stretch reflexes were markedly exaggerated bilaterally, more in the legs than the arms, with a very prominent crossed adductor reflex…Head control was impaired. He was unable to sit alone."

9. Dr. Fowler's Diagnostic Assessment was as follows:

> "Neurological examination is markedly abnormal. I would classify this as a form of cerebral dysgenesis with the additional history of an intracranial hemorrhage as noted in his records. The encephalopathy is manifested as microcephaly, profound global developmental retardation, and spastic dysplegia. I also suspect a cortical visual defect, but the examination today of the visual system was not sufficient for a definitive assessment."

10. Dr. Fowler's Recommendation was as follows:

> "The combination of neurological findings including muscle tone, very abnormal stretch reflexes, and persistence of primitive reflexes, clearly establishes

eligibility for CCS services. Physical therapy should be continued. He also requires long term neurological, cardiology, and renal specialists follow-up."

11. The laws and regulations that control place an obligation on Regional Centers to be cost-effective in their operations. The Regional Center's own Early Intervention Services Guidelines A. 2 and 3 state as follows:

"2. Generic and private resources (e.g. insurance) are to be utilized when available. Use of private insurance for early intervention services must be voluntary where the parents would incur a financial cost, e.g., a decrease in lifetime coverage, an increase in premiums, or an out of pocket expense such as a deductible or co-pay.

3. Denials must be obtained from the appropriate generic and private resources in conjunction with requesting RCOC funding. Services will be approved pending the denial process to facilitate the provision of Early Start services as soon as possible."

12. Regional Center of Orange County was and is mandated to explore all generic resources and utilize such generic resources where they are available. Generic resources refer to the source of funding and do not refer to the particular nature of the service. California Children's Services is known and relied on by RCOC as a provider of competent assessment and on-going treatment for certain individuals who have developmental disabilities. CCS was, in the case of claimant, a generic resource that RCOC was required to seek referral to.

13. There is no question that claimant needs the services he was receiving in the form of PT and OT.

14. Claimant maintains that Aiden is medically fragile and if the family is required to take him to a center-based facility for the provision of therapy, that there will be family hardship and Aiden's health and safety will be jeopardized and he may lose the gains he has made so far in therapy.

15. Claimant submitted letters from Drs. Theodore Caliendo and Kavita Sharma. Dr. Caliendo is one of claimant's pediatricians. His letter, dated February 23, 2006, was addressed to California Children's Services and reads as follows:

"The patient has several problems including renal failure, microcephaly and developmental delay. Currently he is medically fragile but has improved somewhat on his current therapy regimen. Therefore, if possible, it would be far more preferable to continue his therapies, especially his physical therapy program, in the home, rather than outsourcing this therapy elsewhere. Thank you for your consideration."

Dr. Sharma wrote, on March 1, 2006:

"Aiden needs services in home because of his renal failure. Because of his developmental delay Aiden needs/takes weekly. Please call if any questions."

16. Neither statement from Drs. Caliendo or Sharma explains in any fashion how they reach the conclusions they make. They do not establish, even if the Early Start laws and regulations provided for it, any justification for not making a referral to CCS. Nor do their letters establish grounds exist to avoid such a referral to CCS.

LEGAL CONCLUSIONS

1. "Early Start" is the name used in California to reference a federally funded program for young children at risk for certain disabilities. The law is found in the Individuals with Disabilities Education Act (referred to as IDEA), Subchapter III, Infants and Toddlers with Disabilities (20 U.S.C., §§ 1431-1445) and the applicable federal regulations found in 34 CFR sections 303 et seq. Each state was offered federal funds for participation in the program whereby certain children 36 months of age and younger would be given services, if they complied with these specific rules and regulations.

2. California chose to participate in this federal program and passed the necessary legislation to implement the program. The state statute is entitled California Early Intervention Services Act and is found at Government Code section 95000 et seq. California also adopted regulations to implement the program that are found at Title 17, California Code of Regulations, sections 52000 through 52175. Government Code section 95014, subdivision (b) provides that the responsibility for the provision of federally funded early intervention services fall within the purview of the Department of Developmental Services as the "lead agency." Government Code section 95004 provides that the regional centers that are established under the Lanterman Act (Welf. & Inst. Code, § 4500, et seq.) shall serve the developmentally disabled as the conduit for Early Start services. Title 17, California Code of Regulations, section 52108 requires that early intervention services be "provided, purchased or arranged" by the regional centers. The services for eligible infants and toddlers are provided through a shared responsibility between the regional centers and the local education agencies. (Gov. Code, § 95006.) The Early Start services must be provided, however, pursuant to the Early Start federal law, the corresponding state statute and the implementing federal and state regulations.

3. Once the regional center evaluates and determines a child is eligible for Early Start services, the regional center is responsible for then instituting a planning process for the child's early years. (20 U.S.C., § 1436, 34 C.F.R., § 303.344, Gov. Code, § 95028 and Cal. Code Regs., tit. 17, § 52106.) This planning process includes the preparation of an IFSP that is developed at a conference with the child's family representatives, the regional center representatives and other appropriate participants. The IFSP must include a list of services to be provided to the child as well as other information. The services called for in the IFSP

must be provided to the child at no cost to the family. (20 U.S.C., § 1436, 34 C.F.R., §§ 303.344, 303.12, subd. (iv), Gov. Code, § 95028 and Cal. Code Regs., tit. 17, § 52106.)

4. Under Early Start, intervention services are defined as services that ". . . are designed to meet the developmental needs. . ." of an infant or toddler with a developmental disability. (20 U.S.C., § 1432, subd. (4)(C).) The services provided should support and enhance a family's ability to meet the unique special developmental needs of their child with disabilities. (Gov. Code, § 95001, subd. (a)(3).) The regional center is required to provide early intervention services that are ". . . designed to meet the developmental needs of each eligible infant or toddler and the needs of the family related to the infant's or toddler's development." (Cal. Code Regs., tit. 17, § 52000, subd. (b)(12).) The services should include: family training, counseling, and home visits, assistive technology, audiology, health services, medical services only for diagnostic or evaluation purposes, nursing services, nutrition services, occupational therapy, physical therapy, psychological services, service coordination services, social work services, vision services, special instruction, speech and language services, and transportation and related costs necessary to enable the child to receive his services. (20 U.S.C., § 1432, subd. (4)(E) and Cal. Code Regs., tit. 17, § 52000, subd. (b)(12).) The evidence established that petitioner is receiving the services he needs that he is entitled to under the law. Early intervention services may also include other services that help meet the developmental needs of the child and the needs of the family that are related to the child's development, such as respite and other family support services. (Cal. Code Regs., tit. 17, § 52000, subd. (b)(12).) However, there was insufficient evidence presented to establish that petitioner and his family needs additional services in this case.

5. The evidence establishes that the early start services being provided to petitioner are appropriately designed to meet the developmental needs of the petitioner. There is insufficient evidence to support the claim that petitioner's needs would not or could not be met if he is referred to California Children's Services. Furthermore, the evidence did not establish that claimant is medically fragile for the purpose of avoiding referral to CCS.

Regional centers are operated by private nonprofit community agencies. While the Department of Developmental Services may promote uniformity and cost effectiveness in the operation of regional centers, its responsibility does not extend to the control of the manner in which regional centers provide services or in general operate their programs. See, *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.App.3d 384.

6. The legislation that creates the regional center system imposes an obligation on the regional centers to be cost-effective in their operations. Furthermore, RCOC's own Early Intervention Services Guidelines require that generic resources be pursued before regional center incurs costs.

RCOC Early Intervention Services Guidelines A. 2 and 3 provide as follows:

"2. Generic and private resources (e.g. insurance) are to be utilized when available. Use of private insurance for early intervention services must be voluntary where the parents would incur a financial cost, e.g., a decrease in lifetime coverage, an increase in premiums, or an out of pocket expense such as a deductible or co-pay.

3. Denials must be obtained from the appropriate generic and private resources in conjunction with requesting RCOC funding. Services will be approved pending the denial process to facilitate the provision of Early Start services as soon as possible."

ORDER

1. The Regional Center of Orange County was authorized to refer claimant to California Children's Services for evaluation and treatment.

2. Claimant failed to establish any legal cause to prevent or avoid such a referral.

3. If claimant is "medically fragile" that determination is properly made by CCS.

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.

DATED: _____

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STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings